IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL SESSIONS CASE NO. 89 OF 2015

REPUBLIC

VS

EMMANUEL ANDREA

12/3/2017 & 16/3/2018

JUDGMENT

I.P.KITUSI ,J.

Emmanuel Andrea, the accused, stands charged under section 196 of the Penal Code 16 R.E. 2002 allegedly for murdering one Matrida Marco on 16th October 2013 at Mtoni Sabasaba area within the District of Temeke in Dar es Salaam Region. The accused denied these allegations.

The prosecution case told by six witnesses is that the accused and one Selina John Nkwera(PW1) were husband and wife or cohabiting under that relationship which had given them one child known as Prosper. However Pw1 had two other children, Flora Emmanuel Mapunda (Pw3) and Tatu Zulu Mapunda (Pw4) from her previous relationship. All was not well in the relationship of Pw1 and the accused, and the child Prosper was the centre of some conflicting positions.

The couple were living with the three children in a rented house at Mtoni Sabasaba. Matilda Marco, the deceased, was a friend of Pw3

and Pw4 and on 16th October 2013 in the evening she was with the two daughter in Pw1's kitchen watching her prepare buns for business. The accused had a shop within the same compound it seems where Flora Inyasi (Pw2) operated a drinking place commonly known as " *Grocery".*

At around 8.00 P.M. the accused allegedly approached the kitchen while holding Prosper the small child, and asked Pw1 to give him the child's shoes. When Pw1 refused for the reason that it was bedtime for the child, the accused left, saying that he would buy shoes for the child along the way. A fight over the child ensued and only with the helpof neigbours including Pw2, was Pw1 able to escape from the couple's bedroom, holding the child. She went to Sabasaba Police station nightway to report the conflict over the child but while she was still there, Pw4 turned up and told her that the accused had set fire on the daughters. This part is told by Pw2, Pw3 and Pw4.

When Pw2 was back at her business place, she saw the accused carrying a small bucket which appeared to contain something. He told Pw2 and her companion, one Jeniffer, that he was going to kill them. However Pw2 and Jeniffer did not react, but about thirty minutes later they heard voices of people crying for help from fire. This is when Pw2 and Jeniffer turned to look at the direction of the voices, only to see a huge fire and smoke from Pw1's room. Pw2 and Jeniffer also raised alarms and people turned up at the scene.

The room which was being used by Pw1 as a kitchen and used by Pw3 and Pw4 as a bedroom was on fire and the cries were coming from inside it. The people who responded to the alarms broke the door open, whereupon the accused ran out from it. The others who were in the room, that is, the deceased, Pw3 and Pw4 were helped out and two of them rushed to hospital. According to Pw1 when she left for the police she instructed her daughters to carry on the work of preparing buns, therefore she is a witness to the fact that the daughters and their friend, (deceased) were in the room.

Pw3 and Pw4 testified as to what happened before they were rescued. According to these witnesses who were referring to the accused as their father, when they were in the kitchen, making buns with the deceased around, the accused entered the room carrying a bucket and closed the door behind him. Both Pw3 and Pw4 recognized the contents of the bucket as petrol, telling from its smell, and they narrated how the accused poured it all over the room and lit it by a match. The room caught fire and the children raised alarms to seek for assistance as the accused sat back and did nothing. Then the door was broken open and the accused ran out.

Pw3 and Pw4 gave details of the way they were burnt and displayed to the court some permanent disfigurements on their arms. They were taken to hospital from where they were transferred to Muhimbili National Hospital where their friend succumbed to death due to the burns. Dr Emmanuel Zebadial Moshi (Pw5) who did the Postmortem examination and prepared a Report(Exhibit P2) testified

that the deceased died as a result of the burn, estimated at 30% or second degree. The Postmortem examination was conducted by Pw5 upon a request by D/CPL Israel (Pw6) the officer who investigated the case.

Pw6 recorded statements from the victims as well as preparing a sketch plan of the scene of crime which was tendered as Exhibit P1. He testified that on 3/1/2014 the deceased's father called to inform him that the accused had been seen at Mlandizi area picking used bottles. Following Pw6's instructions Pw1 and the deceased's father went to Mlandizi where they sought assistance from the police stationed at the nearby post and had the accused arrested. On 6/1/2014 Pw6 took the accused from Mlandizi to Dar es Salaam where he interrogated him. The accused admitted to Pw6 that he was the one who set the house ablaze because of a conflict with his wife.

In defence however the accused's defence was characterized by denial of everything except the fact that he knows Pw1, not being his wife as the prosecution would like to be believed, but as a woman he was seeing. He stated that apart from his visits to Pw1 on occasion when he wanted to meet her, he did not know Pw1's children Pw3 and Pw4, and was unaware that he had a child with her known as Proper.

The accused said he was running two shops, one at Mtoni kwa Azizi Ally, Sabasaba, in Dar es Salaam and another at Mlandizi. He said that he had employed people to attend to his shops but during the period relevant to this case the attendant of the Mlandizi shop had traveled to

his village, which necessitated him to personally attend that shop. The accused invites the court to find that during the alleged inferno at Mtoni Sabasaba he was at Mlandizi attending to his shop, and had nothing to do with it.

In further examinations by a Mr. Gwamka Mwaikugile learned counsel who assisted the accused, he stated that the fire could have been caused by range of other factors such as electrical fault, a burning candle, a burning mosquito coil, children playing with fire and the like. The accused said he had in many occasions seen Pw1 assign Pw3 and Pw4 her daughters, to make buns. However, he stated, since he was not at the scene, he could not tell what caused the fire that caused the death in this case.

The accused did not dispute being arrested at Mlandizi but disputed the allegation that he made a statement in which he confessed to causing the death. Accused's response to questions put to him by Ms. Daisy Makakala and Ms. Batilda Mushi, the learned State Attorneys who prosecuted this case, was interestingly dramatic. He said that his relationship with Pw1 lasted 3 years although it was not a smooth one. During this span he maintained his own residence separate from Pw1's although they were located at the same place. He did not know Pw1's number of children. In one breath he said he did not know the age of Pw1's youngest child and in another he said he did not have a child with her. He said he did not know the number of children Pw1 had, because that was never the centre of his interest in her. The accused has a visible scar on his arm to which the learned

State Attorneys drew his attention, and wanted to know how he got it. The accused explained that it was caused by a burn he sustained during a car accident which forced him to touch a hot exhaust pipe by his arm. He further stated that between 16th October 2013 and 3rd January 2014 when he was arrested, he never visited his shop at Mtoni Sabasaba because he was getting reports from his employee.

In substance that is the evidence for the prosecution as countered by the defence. Upon request I invited written submissions by the learned State Attorneys and from the defence counsel too. Mr Gwamka Mwaikugile has submitted that the prosecution has not proved the case beyond reasonable doubts, underlining the cardinal principle of presumption of innocence. The learned counsel cited a number of foreign decision to support this fact. With respect without referring to these foreign decisions, they relate to settled principles of Criminal law that the accused is always presumed innocent until the prosecution proves beyond reasonable doubt that he is guilty. For this principle one need not fish in foreign waters because we have more than enough jurisprudence in that respect, See for instance, the case cited by the learned counsel himself, of **Mswahili Muhagara** V.R [1997] T.L.R 25.;

Besides, the main issue in this case is whether or not the prosecution has discharged its burden of proof that the accused caused the death of Matilda Marco. Mr Mwaikugile referred to portions of testimonies by persecution has witnesses which are inconsistent with accused's guilt. With regard to Pw1 he reffered to her admitting the fact that it was dangerous to trust the children with the making of buns

without the presence of an adult, and that if somebody told her that the fire was caused by the children mishandling of the fire during cooking. She would be prepared to accept that story.

Then the learned counsel referred to the evidence of Pw3 who did not know Pw1's where about when the fire erupted nor did she know who locked the door from outside when the kitchen was ablaze.

Strangely Mr. Mwaikugile proceeded to criticize even the evidence of Pw6 regarding a cautioned statement and dying declaration both of which were not admitted in evidence. He submitted on the strength of the accusde's alibi but again submitted that even if it is said that the accused was at the scene, there is no proof of his participation in the commission of the offence. The learned counsel submitted that the mere presence at the scene of crime is not proof of guilt, and he cited the case of **Zuberi s/o Rashid V.R.** [1957] E.A. 455.

The learned counsel submitted that the case is based on suspicion which however strong it may be does not form a basis for conviction[**Shabani Mpunzu @ Elisha Mpunzu V.R** Criminal Appeal No. 12 of 2002 Mwanza (unreported)]

In their submissions the learned State Attorneys stated that proof beyond reasonable doubt does not mean a duty by the prosecution to disprove every assertion made by the accused even if it does not cast reasonable doubts on the prosecution case. They cited the old principle in the case of **Miller V. Minister of Pansion** (1947) 2

All ER 372 that the law would fail to protect the community if fanciful possibilities were allowed to defect the course of justice. This principle was re- affirmed in our local decisions in the cases of **Magendo Paul & Another V. Republic** [1993] TLR 220 and (handiakant) **Jushubhai Patel V. Republic**, Criminal Appeal No. 13 of 1998 CAT(unreported) both cited by the learned state Attorneys in their submissions.

Then the learned state Attorney's discussed the evidence. They submitted that the evidence. They submitted that the evidence of PW1, PW2, PW3 and PW4 provides proof that on 16 October 2013 the accused and Pw1 fought over the child Prosper and when Pw1 had gone to the Police to report the brawl, the accused set on fire the room in which Pw3, Pw4 and the deceased were. They submitted that accused's defence consisting of alibi was a lie and cited the case of **Felix Lucas Kisinyila Republic**, Criminal Appeal No. 129 of 2002 CAT at Dar es Salaam (unreported) for the principle that the lies of an accused person may corroborate the prosecution case.

I may now proceed to determine this case beginning with making findings of matters that are either undisputed or have been proved to my satisfaction. The fact that Matilda Marco is dead, and died an unnatural death is not disputed and I make a finding of that fact. On the evidence of Pw5 I am satisfied that the cause of death was wounds caused by fire and that those wounds led to septicemic shock which in turn led to multiple organ failure. This conclusion by Pw5 is, in my view, consistent with her testimony that the deceased had sustained

second degree burn, and it is supported by Pw2 Pw3 and Pw4 who saw the deceased' state after the fire

The evidence of Pw1 PW2,PW3 and PW4 satisfies me that the fire erupted at Mtoni Sabasaba area on that part of the house which was being used by Pw1 as a kitchen as well as a bedroom for her two daughters, Pw3 and Pw4. I find it undisputed that the accused was operating a shop within the house in which Pw1 was living with her children. My conclusion from the testimonies of PW1, PW2,PW3 and PW4 is that PW1' had a small child known as Prosper.

The main controversy which forms the basis of decision in this case is whether the accused is the one who caused the fire that eventually caused the deceased's death. In determining this issue I will address myself to some sub- issues, including whether or not the child Prosper was the centre of some conflicts between Pw1 and the accused. Without determining the question whether the accused is the biological father of Prosper, a fact in respect of which no evidence was led, it is irrelevant to these proceedings. I accept Pw1's testimony as true that there was a brawl over the child between her and the accused. Applying the principle in the case of **Goodluck Kyando V. Republic** Criminal Appeal No. 118 of 2003 CAT (unreported) that every witness is entitled to credence, I take Pw1's word for the fact that the accused and her had a common interest over the child Prosper and fought for him after which she took refuge to the nearest police station. While I agree with Mr. Mwaikugile's submissions that it is the duty of the prosecution to prove the case beyond reasonable doubt

and not the accused's to prove his innocence, I still find the accused's account in respect to this aspect highly improbable and hard to believe. The suggestion by the accused is that he did not know Pw3 and Pw4 or Prosper for that matter. I accept and apply in this case the principle in the case of **Felix Lucas Kisinyila V. Republic** Criminal Appeal No. 129 of 2002 CAT at Dar es Salaam (unreported) cited to me by the learned State Attorneys in their submissions that lies of an accused may corroborate the prosecution case.

The prosecution's case is that when Pw1 had ran away with the child accused set ablaze the room in which the deceased and Pw3 and Pw4 were. Accused defence in this regard is that he was not at the scene of the said crime, as he alleges to have been at Mlandizi area.

First of all I am firmly satisfied that the accused was at Mtoni sabasaba area immediately before and after the fire incident that eventually caused the death of the deceased. This is my conclusion from the accounts of Pw1,PW2,PW3 and Pw4.

Secondly I find the accused's defence of alibi to have been raised in violation of section 194(4) of the Criminal Procedure Act, [cap 20 R.E 2002] which requires a notice of such defence to be given early. In the instant case that notice was not given but even during cross examinations it was never suggested by the accused or his advocate that on the material date he was not at the scene. I find the following passage in the case of **Mohamed Katindi V. Republic** [1986] TLR 134 at page 145 to be relevant.

" it is the obligation of a defence counsel, both in his duty to his client and as an officer of the court, to indicate in cross- examinations the theme of his client's defence so as to give the prosecution an opportunity to deal with that theme".

In the cited case the court agreed with the defence counsel's explanation that the omission to cross- examine was accidental. In this case it was submitted by Mr. Mwaikugire for the accused that the fact that the prosecution admitted the fact that accused was found at Mlandizi supports the accused's account that he had another shop at that area. With respect there seems to be no dispute as regards the fact that the accused had another shop at Mlandizi. The only issue presently is whether or not the accused was at Mtoni Sabasaba. No suggestion was made by cross examinations that the accused was at Mlandizi.

In my conclusion on this point I find the failure by the defence to cross – examine the prosecution witnesses on the fact that he was at Mtoni area as proving that this was an afterthought. Having earlier found that the accused was at Mtoni sabasaba and quarreled with PW1, and since I accept the version narrated by PW1,PW2, PW3 and PW4 I reject the accused's defence of alibi.

I now turn to the issue whether the accused is the one who lit the fatal fire. To this there is the evidence of Pw3 and Pw4. These two

witnesses narrated how the accused, the man they were referring to as their father, walked into the room where they were, and poured petrol in it before setting it on fire. In defence both through the accused's testimony and Mr Mwaikugile's written submissions a suggestion that the fire could have been a result of some accident caused by a person other than the accused, was raised. That it could have been caused by the children's mishandling of the stove, or gas explosion or a candle or mosquito coil.

Mr Mwaikugile's submissions pointed out some parts in the testimonies of Pw1 and Pw2 tending to show that these witnesses could not know who set the house on fire, because they were not there. He also referred to a contradiction in the testimonies of Pw3 and Pw4 regarding whether the door to the kitchen was locked from outside or inside and who locked it.

In response to this the learned state Attorneys submitted that the prosecution has proved its duty of proving beyond reasonable doubt, that the accused is the one who caused the fatal fire. It is submitted by them that the obligation to prove the offence does not mean disproving every assertion made by the accused. They cited the case of **Magendo Paul & Another V. Republic** [1993] TLR 220, to support their position.

With respect the question as to who set the house on fire must be determined on the basis of the testimonies of Pw3 and Pw4 who claim to have been in the room when the same was set ablaze. Therefore if there are inconsistencies or weaknesses in testimonies of Pw1 and Pw2

regarding that fact, it is neither here nor there. As regards the contradictions in the testimonies of Pw3 and Pw4 I agree with the learned State Attorney that they do not have an obligation to chase rabbits down every hole, so to speak. I associate myself fully with the passage they cited to me from the case of **Magendo Paul & Another V. Republic** (supra), That;

> *" Remote possibilities in favour of the accused cannot be allowed to benefit him. If we may add fanciful possibilities are limitless, and it would be disastrous for the administration of Criminal justice if they were permitted to displace solid evidence or dislodge irresistible in ference."*

I think under the circumstances of this case such lapses are understandable and do not affect the main point at issue. My finding based on the evidence of Pw3 and Pw4 is that the accused was in the room with them and he is the one who set the said room on fire after pouring petrol. My conclusion from the testimonies of Pw2, Pw3 and Pw4 is that the accused only got out when the door to the room was broken open. Thus I am satisfied beyond reasonable doubt that the accused is the one who set on fire the room in which the deceased was, causing burns that in turn caused her death.

The last question is whether in setting the room on fire the accused had the intent to cause death or grievous harm. In dealing with this point I reiterate the fact that the accused had been engaged in a fight with Pw1 over the child Prosper and Pw1 won by running off with that child. I conclude from this fact that the accused got annoyed and sought to get even with Pw1, which constitutes motive on his part. Accused's malice is clear from the nature of the substance he used in setting the room on fire. Petrol is a highly in flammable substance which leaves only one conclusion that in pouring it and then lighting it the accused had only one intention to burn everyone in the room to death. Accused's conduct after the incident is also indicative of malice aforethought because he escaped and stayed away from the house throughout until he was arrested. If he was getting reports on the progress of his shop as he claims, that employee must have told him that fire had erupted at the house and caused death. There is no explanation why he did not turn up subsequent to 16th October 2013, except that he was guilty.

The case of **Turutu Mnyasule V. Republic** [1980] TLR 2014 supports my view that the nature of weapon and conduct of accused may be relevant in establishing that there was malice a forethought.

The court of Appeal held;

> *" Finally we agree with the views of the learned trial Judge that the nature of the weapon used by the appellant and the nature of the wounds inflicted by him, considered together with the conduct of*

the appellant immediately before and after the stabbing, clearly show that the appellant had malice aforethought."

And so is my conclusion in this case, I agree with the unanimous opinions of the assessors and find the accused guilty and convict him of murder as charged.

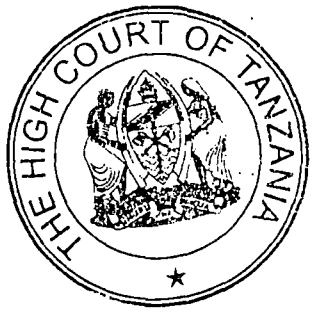
Right of Appeal explained

I.P.KITUSI

JUDGE

16/3/2018

Court: Judgment read over in court in the presence of the accused person and the Assessors.



I.P.KITUSI

JUDGE

16/3/2018